Office-Supreme Court, U.S.
FILED
MAY 9 1966
JOHN F. DAVIS, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. ~~1292~~ 721

The PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

MARY MORAN PAJALICH,
Chief Counsel for the Public Utilities Commission of the State of California,
5072 State Building,
San Francisco, California 94102,
Attorney for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Opinions, Orders and Notices Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	5
Statement of the Case	6
A. The parties and the nature of their interests	6
B. The proceeding before the Commission	7
C. The proceedings in the court below	12
Reasons for Granting the Writ	13
A. The decision of the court below and the public notice and memorandum opinion and order of the FCC are contrary to the intent and purpose of the Federal Communications Act	16
1. The policy underlying the Act has been contradicted	16
2. The Act calls for a standard of just and reasonable rates	17
3. FCC abused its discretion when it acted from an uninformed position	18
B. The decision of the court below and the public notice and memorandum opinion and order of FCC fail to give effect to the relationship between AT&T and affiliate Western Electric Company	19
1. FCC did not consider reasonableness of prices paid by AT&T Bell System to Western Electric Company	19
2. FCC has been given the duty of regulating Western Electric manufacturing, supply and construction activities in lieu of its divestiture from Bell System, and has failed to discharge its duty	21
C. FCC's privately negotiated interstate telephone rate reductions accomplished without any opportunity to be heard afforded to those affected thereby and without essential findings may result in rate reductions being enjoyed by classes of customers not properly entitled thereto	23

Page

D. Privately conducted ratemaking proceedings are contrary to the law of due process and sound public policy 26

E. FCC's public notice was in reality a binding agency action approving and prescribing rates for the future 27

Conclusion 31

Appendix A 1

Appendix B 13

Appendix C 15

Table of Authorities Cited

Cases

Pages

Ohio Bell Tel. Co. v. Comm'n. (1937) 301 U.S. 292..... 26

Pac. Tel. & Tel. Co. v. P.U.C., 62 Cal.2d 671..... 20

Pub. Utils. Com. of the State of Calif. v. U.S.A., F.C.C., 356 F.2d 236 (CA 9 1966), (Appendix A) 2

Smith v. Illinois Bell Telephone Co., 282 U.S. 133, 148, 75 L.Ed. 255 (1930) 23

Statutes

Administrative Procedure Act, 5 United States Code:

Section 1001(C) 5, 11, 26, 28

Section 1001(G) 5, 11, 26, 28

Section 1003 ..... 3, 5

Section 1004 5

Section 1006 .....3, 5, 26

Section 1007 .....3, 5, 26

California Public Utilities Code, Section 307 6

California Constitution, Article XII, Sections 22-23 6

Constitution of the United States, Fifth Amendment 3

Pages

Federal Communications Act, 47 United States Code:
Section 151 ..... 3, 5, 16
Section 152 5
Section 154(J) 3, 4, 5, 26
Section 201 ..... 5, 17
Section 202 5
Section 203 5
Section 204 ..... 3, 5, 26
Section 205 ..... 3, 5, 26
Section 206 5
Section 207 5
Section 208 5
Section 211 5
Section 212 5
Section 213 5
Section 214 5
Section 215 ..... 5, 20
Section 216 5
Section 217 5
Section 218 5
Section 219 5
Section 220 5
Section 221 5
Section 402 ..... 2, 3, 5, 12
Section 403 ..... 3, 5
Section 405 5

Judicial Review Act, 5 United States Code, Chapter 19A:
Section 1031 ..... 5, 12
Section 1032 ..... 5, 12
Section 1033 ..... 5, 12
Section 1034 ..... 5, 12
Section 1037(b) 5
Section 1040 2

28 United States Code, Section 1254(1) 2

Opinions of State Regulatory Agencies

Inv. of The Pacific Tel. and Tel. Co., 62 Cal.P.U.C. 775 (1964) 20

Miscellaneous

	Pages
Business Week, Jan. 9, 1965	10
Cong. Record, 78 p. 8824	20
FCC Public Notice No. 82425-C, April 7, 1966	13
FCC Public Notice, September 30, 1953	15
Preliminary Report on Communication Cos. H.R. 2223, 73d Cong., 2nd Sess. (1934), April 18, 1934 pursuant to H.R. Res. 30, 72d Cong., 1st Sess. (1932), H.R. Res. 572, 72d Cong., 2d Sess. (1933)	14
Report of Antitrust Subcommittee (No. 5), Judiciary Committee H.R., 86th Cong., 1st Sess., H.R. Res. 27	21
Rules U. S. Court of Appeals, 9th Circuit, Rule 23	2
Separations Manual N.A.R.U.C.	24
Senate Report 752, 79th Cong., 1st Sess., p. 31	15, 27
Subcommittee Committee On Appropriations, U.S. Senate, 89th Cong., 1st Sess., H.R. 7997, May 18, 1965, p. 449	7, 19, 27, 29
Telecommunications Reports, Nov. 30, 1964	10
Wall Street Journal, Nov. 27, 1964	10

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No.

The PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

The Petitioner, Public Utilities Commission of the State of California (California), respectfully prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit made and entered in the above-entitled case on February 9, 1966.

OPINIONS, ORDERS AND NOTICES BELOW

The opinion of the Court of Appeals for the Ninth Circuit Docket No. 20,004, decided February 9, 1966, is reported at 356 F.2d 236 (CA 9, 1966). (Appendix A.) The Federal Communications Commission's (FCC) Memorandum Opinion and Order adopted February 10, 1965 appears at R. 10-14. California's Petition For Rehearing of December 22, 1964 appears at R. 4-9. FCC Public Notice 60279 dated November 25, 1964 appears at R. 1-3.

JURISDICTION

The decree of the Court of Appeals for the Ninth Circuit was entered on February 9, 1966. (Appendix B.) Petitioner herein did not petition for rehearing before the Court of Appeals.[1] The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1), 47 U.S.C. 402 and Chapter 19A of Title 5 U.S.C., Section 1040.

QUESTIONS PRESENTED

1. Should this Court legitimize, as a matter of national policy, FCC's practice of rate regulation (miscalled "continuing surveillance") which consists of holding secret, private, closed-door hearings and negotiations with American Telephone & Telegraph Co.

[1]Rule 23 of the United States Court of Appeals for the Ninth Circuit allows thirty days after judgment to petition for rehearing.

(AT&T) to force changes in rates, in violation of the provisions of 5 USC 1003, 1006, 1007, 47 USC 151, 154(j), 204, 205(a), 402(a), 403 and the Fifth Amendment to the Constitution of the United States, which actions deny interested parties any right to be heard with respect to factors which would permit FCC to reach an informed and reasonable conclusion, and preclude any possibility of hearing or judicial review?

2. When a rate reduction of $100,000,000 is initiated by FCC action, implemented by holding private proceedings and hearing private presentations covering only a part of the utility's operations, coerced in secret negotiations and accomplished by issuance of a Public Notice, can this Court agree that since FCC failed to proceed in accordance with the Administrative Procedure Act it did not take any action at all?

3. When a rate reduction of $100,000,000 is initiated by FCC action, implemented by holding private proceedings and hearing private presentations covering part of the utility's operations, coerced in secret negotiations and accomplished by issuance of a Public Notice, can this Court approve FCC's semantic gymnastics to the effect that since it did not find that the rates which it insisted upon were reasonable rates, it did not approve or prescribe any rates at all?

4. Is FCC acting in the public interest and in accordance with the expressed intent and purpose of Section 151 of the Federal Communications Act to assure *all* the people of the United States communication service at *reasonable charges* when FCC initiates a proceeding for the purpose of reducing AT&T's

interstate rates, conducts private closed-door sessions in said proceeding at which only AT&T and its witnesses and FCC staff personnel and its witnesses are heard, and thereafter issues a Public Notice stating that AT&T will make specified rate reductions on definite future dates without any findings as to the reasonableness of AT&T's rates, revenues, expenses, rate of return, and investment?

5. Where FCC exercises its power and influence at private closed-door proceedings with representatives of the largest privately owned public utility in the world, causes substantial rate reductions to be made without making any determination at all of any of the elements of a full utility cost of service, and without any opportunity afforded the states to test the reasonableness of FCC's action, can it possibly be said that FCC has conducted its proceedings in such a manner as would best conduce to the proper dispatch of business and to the ends of justice,[2] or that it has given any heed to Congress' direction that any party may appear before the Commission and be heard in person or by attorney?[3]

6. Should this Court approve of the practice of FCC which permits the regulated industry in effect to regulate itself, by accepting for rate-making purposes allocations of plant between interstate and intra state use, which allocations can be arrived at only with the consent of AT&T, without making any de-

[2] 47 USC §154(J).

[3] 47 USC §154(J).

termination of the reasonableness of the allocations or hearing from any of the affected states thereon?

7. Where California's Petition for Rehearing[4] specified with particularity five substantive reasons why the filed tariffs should be questioned at public hearing by FCC on the merits and FCC issued a Memorandum Opinion and Order[5] which determined that California had not offered any substantive reason why the tariff schedules should be questioned, can FCC justify its refusal to have any public hearing at all, in disregard of Congressional mandate[6] that it is the duty of the FCC to investigate when there appears to be any reasonable ground?

STATUTES INVOLVED

The pertinent portions of the statutes involved are set forth in Appendix C. The citations to them are:

Federal Communications Act, 47 U.S.C. Sections 151, 152, 154(J), 201-208, 211-221, 402, 403, 405;

Administrative Procedure Act, 5 U.S.C. Sections 1001(C), 1001(G), 1003, 1004, 1006, 1007;

Judicial Review Act, 5 U.S.C. Chapter 19A, Sections 1031-1034, 1037(b).

---

[4] R. 4-9.

[5] R. 10-14.

[6] 47 USC §208.

STATEMENT OF THE CASE

A. The Parties and the Nature of Their Interests.

The parties to the proceeding in the court below are:

1. Petitioner, the Public Utilities Commission of the State of California, which represents and appears herein for the People of the State of California, of whom over 6 million are telephone subscribers and ratepayers, and for itself as a public utility regulatory agency of state government and as a telephone ratepayer. The Public Utilities Commission of the State of California is an independent constitutional commission authorized and required to regulate public utilities subject to its jurisdiction. (California Constitution, Article XII, Sections 22-23.)[7] California is substantially aggrieved by FCC's Public Notice issued November 25, 1964, and its dismissal of California's Petition for Rehearing by Memorandum Opinion and Order released February 12, 1965, which actions resulted in substantial interstate telephone rate reductions without hearing any evidence on their reasonableness or the reasonableness of Bell System's actual results of operations, and without making any determination or finding thereon.

2. Respondent, Federal Communications Commission, is an independent commission established pursuant to the Federal Communications Act of 1934,

[7]The Attorney for the Public Utilities Commission of the State of California is empowered to "represent and appear for the People of the State of California and the commission" in proceedings involving the regulation of public utilities. (California Public Utilities Code, Section 307.)

which is charged with the basic duty of regulating interstate commerce in communication so as to make available to all the people of the United States a communication service at reasonable charges.

3. California effectively regulates as a public utility The Pacific Telephone and Telegraph Company (PT&T), the largest Bell System operating company, which is 90% owned and controlled by AT&T. Not only the reasonableness of the interstate toll rates paid by the people of the state and by itself as a ratepayer, but also the relation between interstate and intrastate telephone rates of the Bell System, particularly AT&T and PT&T, is of vital interest to California. California exercises its public utility regulatory powers over about 10% of the Bell System by means of *public* hearings which afford *all* interested parties opportunities to be heard, tests the reasonableness of all Pacific's expenses, revenues, investment and rate of return, and publishes decisions with findings and orders which are subject to judicial scrutiny. This public utility regulation requires that an opportunity be afforded to California to participate in FCC proceedings in order, among other matters, to insure that intrastate service is not burdened with costs that should properly be charged to the interstate service.

B. The Proceeding Before the Commission.

On July 9, 10, 13; September 28, 29, and October 12, 1964; FCC held a proceeding for the purpose[8] of

[8]At hearings before Subcommittee of the Committee on Appropriations, U.S. Senate, 89th Cong., First Session on H.R. 7997,

approving or prescribing for the future changes[9] in the interstate toll telephone rates of AT&T and its subsidiaries which operate approximately 72 million telephones, about seven million of which are in California.

FCC gave no notice of hearing or opportunity for anyone other than AT&T and FCC's own witnesses to be heard or to participate. AT&T counsel and witnesses apeared on behalf of AT&T and its subsidiaries. No one was permitted to appear for vitally affected state regulatory commissions or affected ratepayers.

FCC Commissioners sat en banc for six days and heard unsworn testimony from AT&T and FCC staff

---

May 18, 1965, page 449, Subcommittee Chairman Warren G. Magnuson (D., Wash.) inquired into the genesis of interstate toll telephone rate reductions in recent years. He expressed the understanding that the revenue reductions had been initiated as much by the Bell System as by the FCC.

"Senator Magnuson: Hasn't the common carrier [AT&T] come in on other occasions themselves and asked for rate reductions?

Mr. Strassburg (Chief of Common Carrier Bureau, FCC): The rate reductions that I am referring to, sir, are rate reductions *which were initiated by our action.* (Emphasis added.)

Senator Magnuson: Which the Commission initiated.

Mr. Strassburg: The Commission initiated.

Senator Magnuson: Haven't they come in lately . . . and asked for certain reductions in certain areas?

Mr. Strassburg: No. There have been a number of rate classifications for new services introduced by them, but as far as the message toll service which is really the bread and butter service of the American public, it is the Commission's initiative that has brought about the savings to the public I am referring to."

[9]Mr. Crosland (AT&T): "We believe the basic issue before you today is whether the interstate earnings of the Bell System exceed a fair and proper range . . . —whether the public interest and national economic objectives would be advanced *by requiring a reduction in these earnings.*" (Tr. p. 410.) (Emphasis added.)

witnesses. A seven-volume, 845-page transcript of the testimony entitled "Official Reports of Proceedings Before the Federal Communications Commission, Special Meeting with Regard to Bell System Interstate Earnings"[10] was prepared and thereafter made available for sale to interested parties. Copies of ninety-five charts referred to by witnesses and exhibits[11] received in evidence in the proceeding were also made available.

The FCC staff sought to reduce[12] AT&T's interstate earnings, while AT&T sought to retain them[13] or increase them.[14] Opening and closing statements and arguments of both AT&T and FCC staff were heard; six expert witnesses were called, were not sworn, gave their qualifications and testified[15] on behalf of AT&T

---

[10]Tr. 1-845.

[11]R. 17, et seq.

[12]Mr. Kosh for FCC staff: "Bell System's fair rate of return, based on its existing capital structure of 35% debt and 65% equity, and at corresponding cost rates of debt and equity, is . . . 6.4%. When a more reasonable capital structure, consisting of 50% debt and 50% common equity is used, with corresponding cost rates of debt and equity, the fair rate of return would be . . . 6.2%." (Chart 20; Tr. p. 544.)

At 35% debt ratio Bell System's cost of equity is 7.75%; at 50% debt ratio it is 8.25%. (Chart 18, Tr. pp. 526, 527.)

[13]Mr. Crosland, AT&T, Tr. pp. 26, 416-419.

[14]Mr. Crosland, AT&T: ". . . a return of at least 8% is wholly reasonable and necessary." (Tr. p. 26.)

Mr. Scanlon, AT&T: ". . . an equity earnings rate of 10½ to 11 percent is required by AT&T if it is to afford its investors returns comparable to those available elsewhere." (Tr. p. 377.) "Thus, we arrive at a required rate of return . . . of 8 to 8½%." (Tr. p. 378); ". . . a fair rate of return for the Bell System is at least 8% on total capital." (Tr. p. 384.)

[15]Chairman Henry: ". . . let me thank . . . all the people from AT&T and your expert witnesses who have testified." (Tr. 419.) Their testimony can be characterized only as direct testimony,

to the effect that there should be no reduction in interstate earnings. They were subjected to some cross-examination[16] by the FCC staff which also presented direct testimony. AT&T was allowed "surrebuttal".[17]

California alleges on information and belief that: after the reported proceedings FCC held secret and unreported further proceedings with AT&T to further and advance FCC's purpose to take agency action to prescribe and approve for the future reductions in Bell System interstate toll rates; that FCC's staff urged the FCC to reduce the rates by $150,000,000 annually; that under the threat and pressure of a rate reduction of such magnitude, or a public Commission investigation, AT&T "offered" to reduce its interstate toll rates by $75,000,000 annually; that FCC Commissioner Loevinger negotiated a compromise[18] by which AT&T reluctantly and under coercion agreed to a reduction of $100,000,000 annually.[19]

---

despite the statement in FCC's Memorandum Opinion and Order, par. 4, R. 12, that "no direct . . . . examination was had."

[16]Tr. pp. 63-65, 78, 94, 112-114, 190, 195, 196, 217-219, 290-294, 320-324, 372-373, 395, 667, 708-709.

[17]Tr. p. 816.

[18]"Bell was offering a $75-million cut, and the FCC staff was holding out for $150-million. [Commissioner] Loevinger arranged a compromise under which the cut would be $100-million, with $25-million of this assigned to give special benefits to small business." Business Week, Jan. 9, 1965.

[19]"The Commission has had the situation under continuing review and extensive discussions have taken place regarding the appropriateness of existing rates. *The Commission has now insisted on rate reductions* larger than we think justified at this time." AT&T Chairman Frederick R. Kappel, quoted in Telecommunications Reports, Nov. 30, 1964. (Emphasis added.)

"In New York, Frederick R. Kappel, AT&T Chairman, criticized the FCC's action and indicated that the company had agreed reluctantly to the reductions." Wall Street Journal, Nov.

Thereafter, and on November 25, 1964, FCC took agency action[20] by issuing its statement of particular applicability and future effect[21] to wit, FCC Public Notice No. 60279,[22] which was designed to and did in fact prescribe and approve for the future the filing of tariffs by the Bell System to become effective February 1, 1965, reducing its interstate toll rates to $1.00 or less all day Sunday and after 8 P.M. other days for a three-minute station-to-station call made between any two points in the continental United States. These rates accomplished $75,000,000 of the $100,000,000 reduction determined by FCC. The balance of $25,000,000 was to be accomplished by the Bell System filing rates effective April 1, 1965 to provide lower rates for small businesses.

Bell System complied with FCC prescription and approval of the rates by filing appropriate tariffs effective on the designated dates. Thereafter and within thirty days from the date upon which the Public Notice was given, California, representing and appearing for the People of the State of California and for itself as a telephone rate payer, filed its Petition For Rehearing with FCC[23] specifying all errors with particularity. By Memorandum Opinion

---

27, 1964. California deplores the necessity, in the absence of a record of the unreported negotiations, of having to resort to items in the press, but since none has been controverted or denied submits that there is warrant for their veracity.

[20] 5 USC 1001(g).

[21] 5 USC 1001(c).

[22] R. 1-3.

[23] R. 4-9.

and Order dated February 10, 1965, released February 12, 1965, FCC dismissed said petition.[24]

C. The Proceedings in the Court Below.

California petitioned the Court of Appeals for the Ninth Circuit, pursuant to 47 USC 402 and 5 USC 1031-1034, to review and determine the validity of the action and order of FCC.

California urged that FCC, by its failure to give notice of proposed proceedings, by holding private rate-making proceedings, by issuing the Public Notice without findings, and by attempting to circumvent requirements of Federal Administrative Procedure Act and Federal Communications Act, has denied due process to California; that the FCC Public Notice was rate making and an agency proceeding within the meaning of the Administrative Procedure Act; that California has been substantially and adversely affected by the denial of due process because it has not been heard and because it is required to pay rates which have not been found reasonable; that rate regulation under the misnomer of "continuing surveillance" violates the Communications and Administrative Procedure Acts; that California has no other adequate remedy unless the proceeding is remanded with direction to hold public hearings.

---

[24]R. 10-14.

REASONS FOR GRANTING THE WRIT

The public utility regulatory problems which are created by the decision of the court below and of FCC are many and cry out for immediate resolution. Since the decision of the Court below, the law today with regard to the applicability of the Federal Administrative Procedure Act and the Federal Communications Act to FCC is vague and uncertain. Examination into this important area of national interest by the Court is needed. This case presents a question of law, the resolution of which will have far-reaching effects on basic public utility regulatory law. FCC has expressly stated that it does not disavow its so-called "continuing surveillance" procedure even though it might institute a proceeding which complies with the Administrative Procedure Act. It continues, in controversial areas, to make rules, and issue decisions which do not have the benefit of any hearing process whatever,[25] and which, like the Public Notice herein, are not even published in the Federal Register.

The overall public question is whether this Court will permit AT&T to continue in the future to operate under the guise of federal "regulation" which consists of sheltered, protected, ex parte negotiations with the "regulator". The decision of the Court of Appeals puts a stamp of approval on a technique used by FCC

[25] (Cf. Public Notice No. 82425-C, April 7, 1966, in which the Commission *finds* "controlling . . . the interstate character" of signals of television broadcast stations carried on the local distribution facilities of AT&T and General Telephone and Electronics Service Corporation under tariffs filed in most states, and "that no such service should be provided except under appropriate tariffs on file with this Commission."

to place its secret negotiations with AT&T "off limits" to public or judicial scrutiny in derogation of the regulation contemplated by the Federal Communications Act of 1934[26] and the guaranties of due process contained in the Administrative Procedure Act.

This case may be characterized as an important public problem of general application in that its resolution by this Court will materially affect the rates for telephone service rendered by every telephone company, Bell System or independent, in the United States.

AT&T Co. is the largest private business in the world. During 1965 it had income of over 11.3 billion dollars, incurred expenses of over 6.6 billion dollars, paid taxes of over 2.4 billion dollars and enjoyed a *net* income of over 1.8 billion dollars spread over an average number of common shares of over 526 million. The total assets for 1965 exceeded 32.8 billion dollars.

The decision of the Court of Appeals amounts to a judicial declaration that the FCC can continue in the

---

[26]The Preliminary Report on Communication Companies [H.R. Rep. No. 2223, 73d Cong., 2d Sess. (1934)], submitted on April 18, 1934, pursuant to H.R. Res. *30*, 72d Cong., 1st Sess. (1932), and H.R. Res. 572, 72d Cong., 2d Sess. (1933) (the so-called "Splawn Report"), p. xxxi:

> "'The American people are entitled to know if they are being overcharged for this service [*i.e.*, telephone service] though they may be satisfied with the quality of the service. . . . The importance of the industry, and the magnitude of its operations call for *actual and not nominal regulation.* Telephone business is a monopoly—it is supposed to be regulated. Thus far regulation, particularly by the Federal Government, has been nominal largely because Congress has not made appropriations sufficient to enable the Interstate Commerce Commission to give effect to existing statutes.'" (Emphasis added.)

future the practice that it has engaged in since the passage of the Federal Communications Act of 1934 of increasing[27] and decreasing interstate toll rates, the "bread and butter service of the American public" (Cf. footnote 10) by private proceedings, conference and negotiation *without ever, even once,* having determined by formal public proceeding the reasonableness of expenses, revenues, rate base, rate of return and cost allocations to the different types of telephone service. FCC forced a privately negotiated 100-million dollar message toll rate reduction without any determination at all of the critical elements of a utility's financial results of operation. The lower Court's approval of FCC's technique will, unless this Court reverses the decision, constitute an invitation to the other Federal regulatory agencies, which presently obey the requirements of the Administrative Procedure Act, likewise to operate outside of the law designed to provide "the minimum requirements of fair administrative procedure."[28]

---

[27]In 1953 FCC allowed AT&T rates to be increased $65,000,000 without hearing or findings of reasonableness, by Public Notice of September 30, 1953.

[28]Senate Report 752, 79th Cong., 1st Sess. p. 31.

A. THE DECISION OF THE COURT BELOW AND THE PUBLIC NOTICE AND MEMORANDUM OPINION AND ORDER OF THE FCC ARE CONTRARY TO THE INTENT AND PURPOSE OF THE FEDERAL COMMUNICATIONS ACT.

1. The Policy Underlying the Act Has Been Contradicted.

Section 151 of the Federal Communications Act[29] declares the compelling reason for federal regulation of the communications industry:

> "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to *all* the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities *at reasonable charges* . . . ." (Emphasis supplied.)

This amounts to a legislative mandate that the vast telephone monopoly which so immediately serves the needs of all the people of the United States in their daily and social lives must be effectively regulated by FCC, the designated instrument of the federal government. Telephone ratepayers in the states look to the state public utility regulatory commissions to assure good intrastate utility service at reasonable rates. The states look to the FCC to likewise regulate the Bell System as a public utility to assure that all telephone users get good interstate telephone service at reasonable rates pursuant to the statute.

A public utility regulatory agency is, in fact, a tribune of the people and is created to furnish protection under new social and industrial conditions to the

---

[29] 48 Stat. 1064 (1934); 47 U.S.C. §151.

users of the monopoly service rendered by a public utility. When the legislative mandate is clear that a public body is created to regulate a public utility, such a regulatory body must perform its duty and not devise a procedural gimmick which has the effect of putting the utility into a privileged sanctuary free from the public probe of the regulatory nose.

2. The Act Calls for a Standard of Just and Reasonable Rates.

Section 201 of the Federal Communications Act[30] declares that all charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable. This is the classical legislative declaration that sets the standard for public utility regulation.

It is fundamental that a public utility is entitled to recover, through rates, its ordinary and legitimate costs and enjoy the opportunity to earn a constitutional rate of return on the property reasonably dedicated to the public service. But the standard of just and reasonable rates is dependent upon the establishment of a public utility's cost of service which requires ascertainment from some point of time as a reference to its reasonable revenues, expenses, rate base and rate of return. ECC has never in its entire existence established a full public utility reasonable cost of service for the AT&T, and this failure is in derogation of the Communications Act.

---

[30]48 Stat. 1070; 47 USC §201.

3. FCC Abused Its Discretion When It Acted From an Uninformed Position.

a. Since FCC has never, at any time in its 32-year history, established a full cost of service for AT&T, it had no base of reference from which to determine what future interstate toll rates should be. Negotiations with the largest and most complicated private business venture in the world on an uninformed basis deprives the ratepaying public from the protection which Congress intended that FCC should provide.

b. Even in the private proceedings held by FCC and AT&T there was no evidence presented or determination made of reasonable revenues, reasonable expenses or reasonable capital devoted to the jurisdictional business, and no finding of a reasonable rate of return thereon. Subsequent negotiations from an uninformed position can hardly be characterized as conducting the public business so as to accomplish the ends of justice.

It is clear that when public hearings are conducted with full opportunity afforded to interested and affected parties to appear and participate the cause is subjected to the ultimate test of the full light of day. Then, when proper findings on material issues are made and a reasonable cost of service is established the regulatory body and all interested parties are fully informed.[31] Anything less is to forsake a government of law for a government by Big—and uninformed—Brother.

---

[31]Tr. p. 671—Mr. Leventhal (AT&T): ". . . You haven't gotten all that is provided by a formal proceeding obviously . . . the record is not as complete as it would be in a formal hearing. . . ."

B. THE DECISION OF THE COURT BELOW AND THE PUBLIC NOTICE AND MEMORANDUM OPINION AND ORDER OF FCC FAIL TO GIVE EFFECT TO THE RELATIONSHIP BETWEEN AT&T AND AFFILIATE WESTERN ELECTRIC COMPANY.

1. FCC did not consider reasonableness of prices paid by AT&T Bell System to Western Electric Company.

Western Electric Company is a manufacturing corporation owned 99.82% by AT&T. It also acts as purchasing agent, supply department, developer, storekeeper, installer, repairer and salvager for the Bell System. Prices paid for commodities used in public utility operations enter directly into the rate base (investment on which a utility's return is earned) and to a degree into operating expenses. Such prices and their underlying costs are therefore directly pertinent to any consideration of rates, and without careful examination of this problem no consideration of rates can be complete.[32]

The higher the prices charged by Western for telephone apparatus and equipment the higher the plant investment on which the Bell System operating companies have an opportunity to earn a reasonable return. The noncompetitive prices of Western's manufactured products increase manufacturing profits and raise telephone operating profits by inflating the rate bases of the Bell operating companies. Both increases accrue to the benefit of AT&T. Yet FCC has *never* held a hearing to determine the reasonableness of

---

[32]Chairman Henry, FCC: "I might add that we have said for a number of years that we ought to look more closely at the Western Electric operation." p. 451, Hearings Before Subcommittee of Committee on Appropriations, U.S. Senate, 89th Cong., First Session on H.R. 7997, May 18, 1965.

Western Electric's prices or costs, although this duty was imposed on it by Congress[33] whose expressed intent was that it should do so.[34] Neither the record nor FCC's Public Notice contains any reference to any adjustment to rate base by reason of unreasonable prices or costs. California can only assume that FCC allowed such costs and prices in full. In fixing intrastate telephone rates California has for 37 years considered Western a manufacturing and construction department controlled by an affiliated company and entitled to no greater return on its sales to the operating company than the latter is entitled to from its ratepayers. (*Inv. of The Pacific Telephone and Telegraph Co.*, 62 Cal. P.U.C. 775, 810 (1964).) It made an adjustment of $22,759,000 to Pacific's *intrastate* rate base for purchases from Western Electric which was recently affirmed by the California Supreme Court. (*Pac. Tel. & Tel. Co. v. P.U.C.*, 62 Cal.2d 671, 696 et seq.) California has been substantially and adversely affected by being denied an opportunity to urge that any unreasonable Western Electric costs and prices be excluded from consideration for rate fixing purposes to the extent that they may be reflected in interstate rates.

---

[33] 47 USC 215.

[34] 78 Cong. Rec. p. 8824.

2. FCC Has Been Given the Duty of Regulating Western Electric Manufacturing, Supply and Construction Activities in Lieu of Its Divestiture From Bell System, and Has Failed to Discharge Its Duty.

On January 24, 1956 the civil antitrust suit of the United States against AT&T and Western Electric Company in the United States District Court for the District of New Jersey was settled by a consent decree.[35] The decree did not require separation of Western Electric from AT&T or dissolution of Western Electric into three manufacturing enterprises. It did not require AT&T and its operating companies to buy telephone apparatus only under competitive bidding. The decree did not require Western Electric to sell to AT&T its substantial stock interest in Bell Telephone Laboratories. The decree did not enjoin arrangements between Western Electric and Bell operating companies making Western for all practical purposes the exclusive purchaser, supplier, developer, storekeeper, installer, repairer, and junker for the entire Bell System. The decree did not enjoin certain arrangements between AT&T and Bell operating companies which enabled AT&T to specify the equipment to be purchased by it and to direct its operations. All of the above relief, however, was sought in the complaint of the United States.

---

[35]Report of The Antitrust Subcommittee (Subcommittee No. 5) Of The Committee On The Judiciary House of Representatives Eighty-sixth Congress First Session Pursuant to H. Res. 27 Authorizing the Committee On The Judiciary to Conduct Studies And Investigations Relating to Certain Matters Within Its Jurisdiction On Consent Decree Program Of The Department Of Justice.

The decree permits Western Electric to continue as a wholly owned subsidiary of AT&T and to continue to hold its 50% stock interest in Bell Laboratories. AT&T Long Lines and the operating companies can continue to buy substantially all of their telephone apparatus from Western Electric without competitive bidding. The result is that the decree permits Western Electric to maintain its relationship in the giant Bell System so that Western Electric can sell more than 90% of all telephone apparatus sold in the United States on the premise that these activities are subject to regulation by FCC.

The concept of public utility regulation, *in fact,* on the national level and the state level is the rationalization for permitting Western Electric to remain a part of the Bell System despite antitrust regulatory policy. All public utility regulatory bodies have authority in fixing reasonable rates for Bell operating companies to inquire into and evaluate the reasonableness of the prices and profits of Western Electric in its business with the operating companies and to disallow for ratemaking purposes such amounts as are determined to be unreasonable or excessive and not in the public interest. California has used this authority since 1929 by making Western Electric adjustments to AT&T's operating affiliate, PT&T. But FCC has never made any determination of the reasonableness of the prices and profits Western has enjoyed from the business of AT&T within its jurisdiction. Blind acceptance of recorded book figures without any study or test of their reasonableness is not

public utility regulation as a substitute for the anti-trust policy of the United States.

C. FCC'S PRIVATELY NEGOTIATED INTERSTATE TELEPHONE RATE REDUCTIONS ACCOMPLISHED WITHOUT ANY OPPORTUNITY TO BE HEARD AFFORDED TO THOSE AFFECTED THEREBY AND WITHOUT ESSENTIAL FINDINGS MAY RESULT IN RATE REDUCTIONS BEING ENJOYED BY CLASSES OF CUSTOMERS NOT PROPERLY ENTITLED THERETO.

Without first establishing a utility cost of service for the entire AT&T operation under the jurisdiction of FCC, based upon tested reasonable expenses, rate base and revenues for a related period of time, it is impossible even to begin to determine whether one class of telephone service is returning its fair share of the costs. When FCC, by its own devices, causes Bell System interstate telephone rates to be reduced without apparent consideration of the reasonableness of cost allocation methods and without having even established as a point of reference an overall cost of utility service, there is imminent likelihood that regulatory chaos may result in the interrelationship of interstate message toll rates and local intrastate rates.

The United States Supreme Court in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 148, 75 L. Ed. 255, 263 (1930) has said:

> "The separation of intrastate and interstate property, revenues and expenses of the company is important not simply as a theoretical allocation to two branches of the business. It is essential

to the appropriate recognition of the competent governmental authority in each field of regulation."

FCC has never, since its inception in 1934, made such a classification or jurisdictional separation. The record of the proceedings before FCC involved herein makes no reference to the methods used to separate intrastate from interstate functions so that FCC might consider only that which is in its jurisdiction in its rate making, nor do the Public Notice or Memorandum Opinion and Order which dismissed California's petition for rehearing give a clue.

The Separations Manual is an unofficial document prepared by a special cooperative committee of the National Association of Railroad and Utilities Commissioners and FCC, with the active participation of AT&T and the United States Independent Telephone Association. It is subject to continuous change and revision. Since AT&T's negative vote vetoes any changes, the manual represents at best a series of compromises. If FCC acquiesced in AT&T's use of the Separations Manual; California alleges that it did so without considering the reasonableness of its procedures or that its use would provide inequitable results between interstate and intrastate earnings and rates.

If FCC had, in the first instance, complied with the Administrative Procedure Act to afford interested and affected parties an opportunity to be heard when it initiated a proceeding to reduce rates, or if it had

granted California's petition for rehearing of the proceeding it held privately with the Bell System, the critical question could be explored of why state regulatory commissions have been required to grant more than $2 billion of intrastate telephone rate *increases* since World War II, largely borne by the small local exchange subscribers, while during the same period FCC has caused interstate toll rates to be *reduced* by more than $1 billion.

Interstate toll service is a major benefit primarily to the relatively few large business customers, while intrastate local *prepaid* exchange service is the basic lifeline telephone service necessary to the health and safety of millions of subscribers. It is important to note that the local exchange service is the fundamental mechanical medium for originating and terminating all interstate calls. If FCC continues to reduce interstate telephone rates from a starting point that is cloaked in mystery, California maintains that there will be an acceleration of the trend of a greater share of the total required revenues being derived from the stable, prepaid, no-risk local exchange business which will inevitably increase the burden on the intrastate local exchange ratepayers least able to pay.

Finally, FCC's continued interstate toll reductions based upon the level of business activity and increasing efficiencies in telephone operations due to increased mechanization of long distance interstate toll service will result in throwing principally on the intrastate local exchange service the costs of substantial improvements that are required to be made in local

exchange plant in order to make the most efficient use of the mechanized toll service, and here again the small local exchange subscribers will be called upon to pay more in rates for something comparatively few will use.

D. PRIVATELY CONDUCTED RATEMAKING PROCEEDINGS ARE CONTRARY TO THE LAW OF DUE PROCESS AND SOUND PUBLIC POLICY.

47 USC 154 (j) provides that "Any party may appear before the Commission and be heard . . . its proceedings shall be public upon the request of any party interested." Sections 204 and 205(a) empower FCC to prescribe just and reasonable charges after full hearing. 5 USC 1006 and 1007 provide the administrative steps necessary to be followed. In violation of all of these, FCC issued its agency statement[36] of its agency action[37] after its agency proceeding[38] approving and prescribing rates for the future with *no* opportunity for hearing.

The most fundamental principle of due process of law is that decisions may not determine issues on which there has been no hearing. *Ohio Bell Tel. Co. v. Comm'n* (1937) 301 U.S. 292, 304-305.

In the conduct of the public business it is important that all regulatory agencies should be required to

---

[36] 5 USC 1001(g).
[37] 5 USC 1001(c).
[38] 5 USC 1001(g).

maintain all possible safeguards against arbitrary or uninformed action.

So vital was this principle to the framers of the Administrative Procedure Act that they found it necessary to point out that it "will be the duty of reviewing courts to prevent avoidance of the requirements of the bill *by any manner or form of indirection* . . ." Senate Report 752, 79th Cong., 1st Sess., p. 31. (Emphasis added.)

E. FCC'S PUBLIC NOTICE WAS IN REALITY A BINDING AGENCY ACTION APPROVING AND PRESCRIBING RATES FOR THE FUTURE.

FCC and the court below have concluded that Public Notice[39] and the Memorandum Opinion and Order[40] do not constitute approval or prescription for the future of rates or agency action within the meaning of the statutes.

These conclusions are at variance with the facts. As FCC Chairman E. William Henry and Bernard Strassburg, Chief of FCC's Common Carrier Bureau, told Senator Magnuson's Senate Appropriations Independent Offices Subcommittee on May 18, 1965, AT&T's rate reductions "were initiated by us" and AT&T resisted them.[41] Despite resistance FCC insisted upon the reduction[42] and negotiated with AT&T as to the categories of services in which the rates were to be changed.

---

[39]R. 1-3.

[40]R. 10-14.

[41]Footnote No. 10, p. 9.

[42]Footnote No. 19, p. 10.

The conclusions are also at variance with the law.

The Administrative Procedure Act (5 USC 1001 (c) and (g)) defines "agency action" as the whole or part of every agency rule or the equivalent thereof; "rule" is defined as any agency statement of future effect including approval or prescription of rates for the future. FCC's Public Notice[43] fits precisely into these definitions.

FCC claims that its Public Notice "did not and could not bind anyone to any action, nor was it a ruling on the proposed tariff filing."[44]

The facts are otherwise. The Public Notice announces the fact and the terms of the deal made with AT&T—in effect a stipulated judgment after the latter's coerced and reluctant agreement. It is purest sophistry to urge that these are "carrier-made rates" —as if AT&T, as a business "subject to regulation" by FCC, were free to disregard the terms of the negotiated agreement, or that it voluntarily or willingly reduced its earnings by $100,000,000 per year. FCC's chairman stated that the reduction was by force.[45]

AT&T knew it was bound by the agreement, for although reluctant and protesting it complied promptly and thoroughly with its terms. Indeed, the

---

[43]R. 1-3.

[44]R. 13.

[45]"Senator Magnuson: What I am trying to say is . . . —Let's take the telephone company in long-distance rates—that they resist all the time any reduction of rates, and you people force them to do it. I don't think that is quite correct, is it?

* * * * *

Mr. Henry (Chairman of FCC): Speaking for the last $100

Public Notice, like a previous Public Notice, was undoubtedly cleared with AT&T before its publication in order to have a clear understanding of its terms. (Tr. 10-12.)

FCC, having arrived at the approved or prescribed reduction and the areas of service to which it would be spread, refused to withhold its publication or to change any of its terms at the request of representatives of affected state commissions which urged FCC to hear them. Although the Public Notice states, "The Commission has also consulted with the representatives of the National Association of Railroad and Utilities Commissioners . . ." the "consultation" did not include participation in the proceeding. It consisted of a meeting held on November 24, 1964, pursuant to the oral requests of National Association of Railroad and Utilities Commissioners and finally, a written request dated October 27, 1964 for a conference before any action should be taken by FCC. Six FCC Commissioners, certain staff members and some NARUC representatives, including a California representative, were present. An FCC Commissioner discussed the proposed reductions in terms of "a negotiated package." NARUC representatives voiced their concern over the fact that the rates for interstate toll calls are lower than those for intrastate toll calls for the same distance, and because such a reduction would create loss of revenue problems in the states.

---

million rate reduction, it is correct.

* * * * *

Senator Magnuson: In effect you haul them in. You put the net over them. They can't get out."

Hearings before Subcommittee of the Committee on Appropriations, U.S. Senate, 89th Cong., First Session on H.R. 7997, May 18, 1965, p. 450.

The next day, November 25, 1964, FCC issued its Public Notice, giving no effect whatever to the "consultation" it had had with NARUC, and making no change whatever in the "negotiated package." Prior to the filing of tariffs for reductions to become effective April 1, 1965, Mr. Ben Wiggins, the Chairman of the NARUC Committee on Communications Problems, made a last-ditch attempt to persuade FCC to meet with his committee for the purpose of giving some consideration to the adverse effects such reductions would have upon the states, asking that FCC spread the remainder of the reduction in such a way that reductions in intrastate rates might be effected. FCC curtly replied such a meeting would not be "useful or productive . . . at this time."

The rates which FCC had, by its "negotiated package," approved and prescribed were filed by AT&T and became effective.

The Court below was persuaded that because FCC did not issue a document termed an order and because it did not make a finding of reasonableness of the rates arrived at as aforesaid, it did not "approve or prescribe" rates.

True, FCC violated the requirements of the Administrative Procedure Act in *not* issuing an order and in *not* giving parties an opportunity to be heard, but it accomplished the aim of an order by its Public Notice.

True, FCC violated the purpose of the Federal Communications Act when it did not find that the rates which it coerced were just and reasonable rates,

but it did "approve or prescribe" rates within the meaning of the Administrative Procedure Act.

It is most ironic, California respectfully submits, that FCC now[46] takes refuge behind the statutes it violated to urge that because it didn't comply with them the reduction must really be considered a "carrier-made" rate.

If FCC didn't effectively order a $100,000,000 rate reduction, if it didn't actually approve or prescribe the rates to accomplish that reduction, what in Heaven's name *did* it do?

CONCLUSION

California respectfully requests the opportunity to present these questions to the Court more fully. They are important questions of public utility regulatory law in the last frontier of the field. Their resolution by this Court will have a far-reaching effect and will demonstrate whether government can regulate the largest business enterprise in the world.

California respectfully submits that this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

MARY MORAN PAJALICH,
Chief Counsel for the Public Utilities
Commission of the State of California,
Attorney for Petitioner.

May 9, 1966.

---

[46]But see footnotes 8, 9, 19.

(Appendices A, B and C Follow)

Appendix A

United States Court of Appeals
For The Ninth Circuit

The Public Utilities Commission of the State of California, Petitioner, vs. United States of America and Federal Communications Commission, Respondents.	No. 20,004

[February 9, 1966]

On Petition to Review an Order of the Federal Communications Commission

Before: HAMLIN, Circuit Judge; MADDEN, Judge of the Court of Claims; and JERTBERG, Circuit Judge.

MADDEN, Judge:

Petitioner, the Public Utilities Commission of the State of California, appears in its capacity as a representative of the People of the State of California and for itself as a regulatory agency and as a telephone ratepayer. It asks this court to review and set aside a Memorandum Opinion and Order of the Federal Communications Commission (hereafter the Commission) dismissing its petition for a rehearing in a

Commission proceeding entitled "Special Meeting with Regard to Bell System Interstate Earnings." Jurisdiction to review the Commission's action dismissing the petition for rehearing rests upon Section 402(a) of the Communications Act, as amended, 47 U.S.C. 402(a) and the Judicial Review Act, 5 U.S.C. 1031-1042.

Pursuant to its authority to regulate interstate telephone rates, the Commission from time to time holds what it deems "informal" conferences with representatives of the Bell System companies as part of its policy of "continuing surveillance" over interstate rates. The controversy here grew out of a series of such meetings held for six days spread over a period of several months in 1964. At these meetings the Commission heard presentations by Bell System and Commission representatives regarding Bell System interstate operations and earnings. Witnesses were not sworn, but opening and closing arguments were made and exhibits used, though not formally introduced into evidence.

Sometime after this series of meetings was concluded the Commission issued a Public Notice stating that the Bell System companies would submit tariffs proposing major reductions in interstate telephone rates amounting to approximately 100 million dollars annually. Thereafter Bell System filed tariffs effective on the dates designated in the Commission's Public Notice by which interstate rates were reduced in the amounts and categories of service set out in the Public Notice.

Within thirty days from the date of the Public Notice petitioner filed with the Commission a request for a rehearing in the matter of the Special Meeting with Regard to Bell System Interstate Earnings claiming that the Special Meeting was a "proceeding" within the meaning of Section 405 of the Communications Act of 1934, 47 U.S.C. 405. Section 405 provides for the filing of a petition for rehearing by persons aggrieved by action taken in any "proceeding" of the Commission. Petitioner alleged that the Commission had violated Sections 205(a) and 409 of the Communications Act and certain provisions of the Administrative Procedure Act, 5 U.S.C. 1001-1011, by denying it an opportunity to be heard in the proceeding and contended that in various ways the Commission had failed to discharge its rate-making responsibilities.

By Memorandum Opinion and Order released February 12, 1965, the Commission dismissed the petition for rehearing on the principal ground that "The Public Notice issued on November 25, 1964, did not and could not bind anyone to any action, nor was it a ruling on the proposed tariff filing." From this Memorandum and Order petitioner appeals.

In support of its contention that it was unlawfully denied notice and an opportunity to be heard; petitioner claims that the Public Notice issued by the Commission at the conclusion of the Special Meeting proceeding was an "agency action" within the meaning of Section 2(g) of the Administrative Procedure Act, 5 U.S.C. 1001(g), and, specifically, was agency action

constituting "rule making" in that it involved the "approval or prescription for the future" of interstate telephone rates. The Administrative Procedure Act defines "rule" in part to include "the approval or prescription for the future of rates . . .", and "rule-making" as "agency process for the formulation, amendment, or repeal of a rule." (5 U.S.C. 1001(c). On the basis of these assertions, petitioner argues that the Commission violated Sections 4, 7 and 8 of the Administrative Procedure Act, 5 U.S.C. 1003, 1006, 1007, which provide for notice and an opportunity to be heard in agency proceedings where rule making is involved.

The legislative history of the Administrative Procedure Act indicates that the phrase "approval or prescription" as used in Section 2(c) of the Act was derived from the Supreme Court's opinion in Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 284 U.S. 370 (1932). See S. Rep. No. 752, 79th Cong., 1st Sess. 225 (1946). In the Arizona Grocery case the issue turned "upon the power of the Interstate Commerce Commission to award reparations with respect to shipments which moved under rates *approved or prescribed* by it," (emphasis supplied), 284 U.S. at 381. In resolving that issue the court drew a distinction between carrier-made rates and Commission-made rates and used the phrase "approved or prescribed" in referring to rates promulgated by the Commission in exercise of its quasi-legislative authority to set rates for the future. Petitioner's appeal, then, boils down to the question whether the rates announced in the

Commission's Public Notice were carrier-made or Commission-made, i.e., approved or prescribed by the Commission. If the Commission's action here was not one of "approval or prescription," then the Commission was not "rule making," and the Administrative Procedure Act's provisions for notice and opportunity to be heard would not apply.

The question whether a rate was approved or prescribed was considered in the case of Interstate Commerce Commission v. Inland Waterways Corp., 319 U.S. 671 (1943). There several eastern railroads had filed new tariffs with the I.C.C., which suspended them for the statutory period and instituted an investigation. A later order vacating the order of suspension and discontinuing the proceeding held that "[t]he proposed schedules are shown to be just and reasonable and are not shown to be otherwise unlawful," 319 U.S. at 682. In answer to the charge that the I.C.C. had approved or prescribed the rates the court said:

> This form of finding has been held by the Commission not to constitute an approval or a prescription of the rates under suspension. Since the Commission refused to approve or prescribe them, they stand only as carrier-made rates which, under the Commission's decisions, leave them open to possible recovery of reparations. Like the Commission, we also refrain from approving or prescribing them. (Footnotes omitted), 319 U.S. at 686-87.

In Ex Parte No. 115, 208 I.C.C. 4 (1935), railroad carriers requested authority to make certain increases

of a general nature in their freight rates and charges. The I.C.C. rejected the railroad's proposals and proposed instead its own plan of "carefully selected, moderate" increases, 280 I.C.C. at 58-61. It authorized the filing of new supplemental tariffs in accordance with its recommendations and declared that the supplements would be permitted to take effect without suspension, 208 I.C.C. at 60. It added that the rates would be subject to complaint and investigation and that Arizona Grocery, supra, would not apply to bar the possibility of future reparations. The railroads filed the rates proposed by the Commission. Certain shippers then brought an action to review the Commission's proceedings, alleging, inter alia, that the Commission had determined just and reasonable rates on insufficient findings of fact and asking the court to annul the Order of the Commission authorizing the filing of the supplemental tariffs. Algoma Coal & Coke Co. v. United States, 11 F. Supp. 487 (E.D.Va. 1935). The three judge court held:

> The position taken by the plaintiffs seems to misconceive the real nature and effect of the Commission proceeding. They take the view that what the Commission did in effect was to determine what would be just and reasonable rates for particular traffic transported by particular railroads, on insufficient findings of fact . . . As already pointed out this misconceives what the Commission did. It *prescribed* no particular rates. It merely permitted the carriers to file new rates without suspension . . . That is to say, the increased rates now complained of are *carrier made* rates and not *Commission* made rates. (Emphasis in original Id. at 493-494.)

The district court in Algoma reached the conclusion that the Commission had not prescribed the rates filed by the railroads in spite of the fact that the new tariffs followed extensive hearings at which over 8000 pages of testimony were taken and in spite of the fact that, as in the present case, the new tariffs were filed at the Commission's direction subsequent to the hearing.

These cases indicate that the phrase "approval or prescription for the future of rates" had an established meaning when incorporated into Section 2(c) of the Administrative Procedure Act in 1946. Under the Arizona Grocery decision it referred to a commission-made rate which was not subject to reparations in a subsequent proceeding, which was binding on the carrier, and which was not subject to alteration except after further hearing. On the basis of the Arizona Grocery decision it had been held that a finding that schedules were "shown to be just and reasonable" did not amount to approval or prescription of rates where the agency had made it clear that it did not so regard its action. Interstate Commerce Commission v. Inland Waterways, supra. And such approval did not occur even though the agency had declared in advance that new rates would be filed and would not be suspended when filed. Algoma Coal & Coke Co. v. United States, supra.

Applying these principles here, we hold that the "Public Notice" issued by the Commission did not constitute "approval or prescription for the future of rates" within the established meaning of that phrase.

The Notice did not preclude ratepayers from seeking damages in a subsequent proceeding; it did not bind the carrier by ordering the Bell System companies to file the proposed tariffs; and it did not preclude them from filing new or revised tariffs upon their own motion. The Commission's Memorandum Opinion and Order dismissing petitioner's request for a rehearing specifically stated that the filing was subject to challenge on the ground that the existing or proposed rates were unreasonable. Accordingly, the Commission was not rule-making in the proceeding in question and the notice and hearing provisions of Sections 4, 7, and 8 of the Administrative Procedure Act are not applicable.

Petitioner claims that the Commission has also violated the hearing provisions of Sections 204 and 205 of the Communications Act. Sections 204 and 205 of that Act provide for notice and hearing whenever after the filing of a new rate the Commission exercises its discretion to "enter upon a hearing concerning the lawfulness thereof . . ." 47 U.S.C, 204. Under section 205 the Commission may, after full opportunity for a hearing, "determine and prescribe what will be the just and reasonable charge . . . to be thereafter followed . . ." 47 U.S.C. 205(a). As we have determined that the Commission proceeding in question here was not one for the "approval or prescription for the future of rates" within the meaning of the Administrative Procedure Act, neither was it a proceeding concerning the lawfulness of new rates within the meaning of 47 U.S.C. 204, nor did the Commission "deter-

mine and prescribe" what would be just and reasonable charges for the future within the meaning of 47 U.S.C. 205. Accordingly, the notice and hearing provisions of these sections are also inapplicable to the proceeding in question and petitioner's claim based upon them is, likewise, without merit.

In addition to its allegations of specific procedural defects under the Administrative Procedure Act and the Communications Act, petitioner asserts that the entire procedure culminating in the Commission's Public Notice was an abuse of the Commission's discretion which deprived petitioner of due process. Petitioner takes the position that if the procedural requirements of notice and opportunity to be heard are held inapplicable to the kind of informal procedures of the Commission's "continuing surveillance" practices in question here, then the Commission, for all practical purposes, is free to conduct rate-making procedures which are beyond the reach of the judicial review which Congress has provided. Fundamental to this position is the assumption that, in spite of whatever disclaimer the Commission might make regarding its intention to bind anyone to any action through the kind of procedure followed in this case, the Bell System companies, as a business subject to the Commission's regulation, realistically are not in a position to disregard the terms of any agreement pressed upon them by the Commission in such proceedings. The result, petitioner concludes, is patently a rate-making procedure which denies it due process because it is

neither authorized nor countenanced by Congress and violates the command of Section 4(j) of the Communications Act that the Commission ". . . conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. 154(j).

We do not think, however, that a claim of constitutional dimensions is properly before us on this appeal. Petitioner recognizes that ratepayers have no vested right to service at any fixed rate but contends that they have a right, here denied, to a reasonable rate. While such a right undoubtedly exists and is recognized in the Communications Act, we do not see wherein petitioner has standing to claim its violation without first challenging the reasonableness of the existing rates, which petitioner has specifically refrained from doing. The thrust of petitioner's due process claim must necessarily be directed at some unlawful deprivation of property resulting from the challenged procedures, for without the unlawful deprivation of property, there can be no violation of any process "due" petitioner under the Fifth Amendment.

Even if they had merit, petitioner's allegations of lack of notice and opportunity to be heard could not raise constitutional questions unless proceeding from a deprivation of property claim. Public utility regulation, historically, has been a function of the legislature; and the prescription of public utility rates by a regulatory commission, as the authorized representative of the legislature, is recognized to be essentially

a legislative act.[1] Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581, 589 (1945). As a ratepayer would have no constitutional right to participate in a legislative procedure setting rates, this right to be heard in a commission proceeding exists at all only as a statutory and not a constitutional right.

Neither can petitioner's broader claim that it has been denied due process by procedures which exceed the scope of the Commission's lawful authority raise constitutional issues unless predicated upon an unlawful deprivation of property. Apart from specific statutory limitations upon the Commission's procedures, of which we have found no violation here, petitioner has no interest in these procedures except in so far as they are ultimately manifested in the established rate. Constitutional due process does not exist in a vacuum; and only through a challenge to existing rates, if at all, could petitioner allege the requisite effect on its property. Those rates stand unchallenged here.

As the Commission pointed out in its Memorandum Order and Opinion, petitioner has a statutory right to

---

[1]This raises the question of whether petitioner has standing to maintain this suit in its capacity as a representative of the people of the State of California. It has long been recognized that a state, as *parens patriae,* cannot institute judicial proceedings to protect citizens of the United States from the operation of federal statutes because it is the United States, not the state, to whom citizens of the United States must look as *parens patriae* for protection of whatever rights they might have under federal legislation. Massachusetts v. Mellon, 262 U.S. 447 (1923). A state would appear to be in no better position to sue to protect its citizens from acts of a regulatory commission acting in a legislative capacity. We need not answer this question, however, as petitioner also appears on its own behalf as a ratepayer claiming, in the first instance, statutory rights sufficient to invoke our jurisdiction.

direct its challenge to the rates themselves and request a formal hearing on the issue of their reasonableness. The assertion by petitioner that the procedures adopted by the Commission are not within its lawful discretion and do not "conduce to the proper dispatch of business and to the ends of justice" is not in itself, however, a valid statement of a violation of constitutional due process. All law is not constitutional law.

The decision of the Commission is affirmed.

Appendix B

United States Court of Appeals
for the Ninth Circuit

The Public Utilities Commission of the State of California, Petitioner, vs. United States of America and Federal Communications Commission, Respondents.	No. 20,004

DECREE

Before: Hamlin, Circuit Judge; Madden, Judge of the Court of Claims; and Jertberg, Circuit Judge.

This cause came on to be heard upon the petition of the Public Utilities Commission of the State of California, filed April 13, 1965, to review an order of the Federal Communications Commission issued by it on February 12, 1965. The Court heard arguments of respective counsel on January 11, 1966 and has considered the briefs and joint appendix filed in the cause. On February 9, 1966, the Court, being fully advised in the premises handed down its decision.

In conformity thereto it is hereby Ordered, Adjudged and Decreed by the United States Court of Appeals for the Ninth Circuit that the order of the

said Federal Communications Commission be, and hereby is affirmed.

A True Copy:
Attest: April 14, 1966,
William B. Luck, Clerk,
By William E. Wilson, Chief Deputy.

Filed Feb. 9, 1965
Wm. B. Luck, Clerk.

Appendix C

Title 47 United States Code

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter. June 19, 1934, c. 652, Title I, § 1, 48 Stat. 1064; May 20, 1937, c. 229, § 1, 50 Stat. 189.

§ 152.

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received

within the United States, and to all persons engaged within the United States in such communication, or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land ve-

hicles in Canada or Mexico; except that sections 201-205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2)—(4) of this subsection. June 19, 1934, c. 652, Title I, § 2, 48 Stat. 1064; 1946 Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7517, 60 Stat. 1352; Apr. 27, 1954, c. 175, § 1, 68 Stat. 63.

§ 154. Conduct of proceedings; hearings

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to

establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided,* That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further,* That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further,* That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary

in the public interest to carry out the provisions of this chapter. June 19, 1934, c. 652, Title II, § 201, 48 Stat. 1070; May 31, 1938, c. 296, 52 Stat. 588.

§ 202. Discriminations and preferences

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

§ 203.

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other

information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any

means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

§ 204. Hearings on new charges; suspension pending hearing; refunds

Whenever there is filed with the Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change of charge, classifica-

tion, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increase charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. June 19, 1934, c. 652, Title II, § 204, 48 Stat. 1071.

§ 205. Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is au-

thorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

§ 206.

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. June 19, 1934, c. 652, Title II, § 206, 48 Stat. 1072.

§ 207.

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies. June 19, 1934, c. 652, Title II, § 207, 48 Stat. 1073.

§ 208.

Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for

investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. June 19, 1934, c. 652, Title II, § 208, 48 Stat. 1073.

§ 211.

(a) Every carrier subject to this chapter shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by the provisions of this chapter to which it may be a party.

(b) The Commission shall have authority to require the filing of any other contracts of any carrier, and shall also have authority to exempt any carrier from submitting copies of such minor contracts as the Commission may determine. June 19, 1934, c. 652, Title II, § 211, 48 Stat. 1073.

§ 213. Valuation of property of carrier

(a) The Commission may from time to time, as may be necessary for the proper administration of this chapter, and after opportunity for hearing, make a valuation of all or of any part of the property owned or used by any carrier subject to this chapter, as of such date as the Commission may fix.

§ 215.

(a) The Commission shall examine into transactions entered into by any common carrier which relate to the furnishing of equipment, supplies, research, services, finances, credit, or personnel to such carrier and/or which may affect the charges made or to be made and/or the services rendered or to be rendered by such carrier, in wire or radio communication subject to this chapter, and shall report to the Congress whether any such transactions have affected or are likely to affect adversely the ability of the carrier to render adequate service to the public, or may result in any undue or unreasonable increase in charges or in the maintenance of undue or unreasonable charges for such service; and in order to fully examine into such transactions the Commission shall have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, of persons furnishing such equipment, supplies, research, services, finances, credit, or personnel. The Commission shall include in its report its recommendations for necessary legislation in connection with such transactions, and shall report specifically whether in its opinion legislation should be enacted (1) authorizing the Commission to declare any such transactions void or to permit such transactions to be carried out subject to such modification of their terms and conditions as the Commission shall deem desirable in the public interest; and/or (2) subjecting such transactions to the approval of the Commission where

the person furnishing or seeking to furnish the equipment, supplies, research, services, finances, credit, or personnel is a person directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier; and/or (3) authorizing the Commission to require that all or any transactions of carriers involving the furnishing of equipment, supplies, research, services, finances, credit, or personnel to such carrier be upon competitive bids on such terms and conditions and subject to such regulations as it shall prescribe as necessary in the public interest.

§ 220.

(b) The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the classes[1] of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case in-

[1]So in original.

clude in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

(i) The Commission, before prescribing any requirements as to accounts, records, or memoranda, shall notify each State commission having jurisdiction with respect to any carrier involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations.

(j) The Commission shall investigate and report to Congress as to the need for legislation to define further or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates. June 19, 1934, c. 652, Title II, § 220, 48 Stat. 1078.

§ 221. Telephone companies; consolidation; state jurisdiction over services, charges, etc., unaffected; determination of property used in interstate toll service; valuation

(a) Upon application of one or more telephone companies for authority to consolidate their properties or a part thereof into a single company, or for authority for one or more such companies to acquire the whole or any part of the property of another telephone company or other telephone companies or the control thereof by the purchase of securities or by lease or in any other like manner, when such consolidated company would be subject to this chapter,

the Commission shall give reasonable notice in writing to the governor of each of the States in which the physical property affected, or any part thereof, is situated, and to the State commission having jurisdiction over telephone companies, and to such other persons as it may deem advisable, and shall afford such parties a reasonable opportunity to submit comments on the proposal. A public hearing shall be held in all cases where a request therefor is made by a telephone company, an association of telephone companies, a State commission, or local governmental authority. If the Commission finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any Act or Acts of Congress making the proposed transaction unlawful shall not apply. Nothing in this subsection shall be construed as in anywise limiting or restricting the powers of the several States to control and regulate telephone companies.

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

(c) For the purpose of administering this chapter as to carriers engaged in wire telephone communication, the Commission may classify the property of any such carrier used for wire telephone communication, and determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service. Such classification shall be made after hearing, upon notice to the carrier, the State commission (or the Governor, if the State has no State commission) of any State in which the property of said carrier is located, and such other persons as the Commission may prescribe.

(d) In making a valuation of the property of any wire telephone carrier the Commission, after making the classification authorized in this section, may in its discretion value only that part of the property of such carrier determined to be used in interstate or foreign telephone toll service. June 19, 1934, c. 652, Title II, § 221, 48 Stat. 1080; Apr. 27, 1954, c. 175, § 4, 68 Stat. 64; Aug. 2, 1956, c. 874, § 3, 70 Stat. 932.

Title 5, United States Code (Administrative Procedure Act):

Section 1001 (c) "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities,

appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

Section 1001 (g) . . . "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

Section 1003. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—.

(a) General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are

impracticable, unnecessary, or contrary to the public interest.

Section 1004. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, ...

(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

Section 1006. In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body

which comprises the agency, or (3) one or more examiners appointed as provided in this chapter . . . . .

(b) Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 1007 of this title, and (9) take any other action authorized by agency rule consistent with this chapter.

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or deter-

mining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Section 1007. In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

* * *

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended,

or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Title 5, Chapter 19A:

§ 1031. Definitions

As used in this chapter—

(a) "Court of appeals" means a court of appeals of the United States.

(b) "Clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed.

(c) "Petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed.

(d) When the order sought to be reviewed was entered by the Federal Communications Commission, "agency" means the Commission; when such order was entered by the Secretary of Agriculture, "agency" means the Secretary; when such order was entered by the United States Maritime Commission, or the Federal Maritime Board, or the Maritime Administration, "agency" means that Commission or Board, or Administration, as the case may require; when such order was entered by the Atomic Energy Commission, "agency" means that Commission. Dec. 29, 1950, c. 1189, § 1, 64 Stat. 1129, amended Aug. 30, 1954, 9:44 a. m., E.D.T., c. 1073, § 2(a), 68 Stat. 961.

§ 1032. Jurisdiction of courts of appeals

The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of section 402 (a) of Title 47, and (b) of the Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and under the Perishable Agricultural Commodities Act, 1930, as amended, except orders issued under sections 210(e), 217a, and 499g(a) of Title 7, and (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 830 of Title 46, and (d) of the Atomic Energy Commission made reviewable by section 2239 of Title 42.

Such jurisdiction shall be invoked by the filing of a petition as provided in section 1034 of this title. Dec. 29, 1950, c. 1189, § 2, 64 Stat. 1129, amended Aug. 30, 1954, 9:44 a. m., E.D.T., c. 1073, § 2(b), 68 Stat. 961.

§ 1033. Venue

The venue of any proceeding under this chapter shall be in the judicial circuit wherein is the residence of the party or any of the parties filing the petition for review, or wherein such party or any of such par-

ties has its principal office, or in the United States Court of Appeals for the District of Columbia. Dec. 29, 1950, c. 1189, § 3, 64 Stat. 1130.

§ 1034. Review of orders; time; notice; contents of petition; service

Any party aggrieved by a final order reviewable under this chapter may, within sixty days after entry of such order, file in the court of appeals, wherein the venue as prescribed by section 1033 of this title lies, a petition to review such order. Upon the entry of such an order, notice thereof shall be given promptly by the agency by service or publication in accordance with the rules of such agency. The action in court shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is sought, and (d) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition upon the agency and upon the Attorney General of the United States by mailing by registered mail, with request for return receipt, a true copy to the agency and a true copy to the Attorney General. Dec. 29, 1950, c. 1189, § 4, 64 Stat. 1130.

§ 1037.

Procedure where no hearing held

(b) Where the agency has held no hearing prior to the taking of the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After such determination, the court shall (1) where a hearing is required by law, remand the proceedings to the agency for the purpose of holding a hearing; (2) where a hearing is not required by law, pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; and (3) where a hearing is not required by law, and a genuine issue of material fact is presented, transfer the proceedings to a United States district court for the district where the petitioner or any petitioner resides or has its principal office for hearing and determination as if such proceedings were originally initiated in the district court. The procedure in such cases in the United States district courts shall be governed by the Federal Rules of Civil Procedure.

§ 1040. Review In Supreme Court on certiorari or certification

An order granting or denying an interlocutory injunction under section 1039(b) of this title shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in section 1254(1) of Title 28: *Provided,* That application there-

for be duly made within forty-five days after the entry of such order. The final judgment of the court of appeals in a proceeding to review under this chapter shall be subject to review by the Supreme Court of the United States upon a writ of certiorari in accordance with the provisions of section 1254(1) of Title 28: *Provided further,* That application therefor be duly made within ninety days after the entry of such judgment. Either the United States or the agency or an aggrieved party may file such petition for a writ of certiorari. The provisions of section 1254(3) of Title 28, regarding certification, and of section 2101(e) of Title 28, regarding stays, shall also apply to proceedings under this chapter. Dec. 29, 1950, c. 1189, § 10, 64 Stat. 1132.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	6
Conclusion	10

CITATIONS

Cases:

Algoma Coal & Coke Co. v. *United States*, 11 F. Supp. 487 — 9

American Telephone & Telegraph Company, In re F.C.C. Dkt. No. 16258, 2 F.C.C. (2d) 871, 2 F.C.C. (2d) 142 — 6, 7

Arizona Grocery Co. v. *Atchison T. & S.F. Railway Co.*, 284 U.S. 370 — 8

Birmingham Slag Co. v. *United States*, 11 F. Supp. 486 — 9

Interstate Commerce Commission v. *Inland Waterways Corp.*, 319 U.S. 671 — 9

Koppers Co. v. *United States*, 132 F. Supp. 159 — 9

Statutes:

Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001–1011) — 2, 5, 8, 9

Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*) — 2, 4, 5, 8

Judicial Review Act of 1950 (64 Stat. 1129, 5 U.S.C. 1031–1042) — 2

223-751—66

Miscellaneous:

	Page
Antitrust Problems of the Space Satellite Communications System: Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary Pursuant to S. Res. 258, 87th Cong., 2d Sess	10
Communications Satellite Legislation: Hearings Before the Senate Committee on Commerce on S. 2814, 87th Cong., 2d Sess	10
F.C.C. Annual Report for 1937	10
F.C.C. Annual Report for 1940	10
H. Rep. No. 1850, 73rd Cong., 2d Sess	10
Progress Report of the Federal Communications Commission: Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, 88th Cong., 1st Sess	10
S. Rep. No. 781, 73rd Cong., 2d Sess	8
S. Rep. No. 752, 79th Cong., 1st Sess	8

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 121

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PETITIONER

v.

UNITED STATES OF AMERICA, AND FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–12) is reported at 356 F. 2d 236. The Memorandum Opinion and Order of the Federal Communications Commission (J.A. 14–21)[1] is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1966, and the petition for a writ of

[1] "J.A." refers to the printed joint appendix filed in the court of appeals.

certiorari was filed on May 9, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

As part of its continuing surveillance over interstate telephone rates, the Federal Communications Commission held meetings with American Telephone and Telegraph Company (the Bell System) to review the Bell System's level of earnings. In these informal sessions, the Commission staff and Bell representatives presented unsworn testimony, exhibits, and argument. The Commission made no findings or other determination of the reasonableness of the rates, as a result of the meetings. However, it released a Public Notice stating that the Bell System proposed to submit revised tariffs which would result in major reductions in interstate telephone rates. The question presented is:

Whether the proposed rate reductions were approved or prescribed by the Commission within the meaning of Section 2(c) of the Administrative Procedure Act, 5 U.S.C. 1001(c), so as to require rule-making proceedings.

STATUTES INVOLVED

Pertinent sections of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001–1011), the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*), and the Judicial Review Act of 1950 (64 Stat. 1129, 5 U.S.C. 1031–1042) are set forth in the petition (Pet. App. 15–39).

STATEMENT

For many years the Federal Communications Commission has maintained an informal continuing surveillance over the interstate rates and earnings of the Bell System to determine whether existing interstate telephone rates appear to be reasonable or whether more formal proceedings are warranted (J.A. 18). As part of this process, the Commission and its Common Carrier Bureau staff met in informal session with representatives of the Bell System in July, September, and October 1964 (J.A. 17). Sitting *en banc,* the Commission heard presentations by Bell System officials, the Commission's staff, and a number of authorities in economics and finance, along with consultants in the regulatory field (J.A. 4–5, 17–19), concerning the various facets of the Bell System's operations (J.A. 5).

The participants made opening and closing arguments, offered unsworn testimony, and submitted various charts and exhibits. None of this data was formally introduced in evidence. A transcript of the presentations was prepared and made public by the Commission (J.A. 23–1008). At the conclusion of the review, the Commission discussed with the Bell System representatives questions raised by the presentations (J.A. 19).

On November 25, 1964, the Commission issued a Public Notice stating that the Bell Telephone Companies would submit tariffs proposing major reductions in interstate telephone rates which approximated 100 million dollars annually (J.A. 1–6). The Public

Notice indicated that this reduction was "made possible by the high level of business activity and increasing efficiencies in telephone operations" (J.A. 2–3). The Commission made no findings as to the appropriate rate of return to be allowed the Bell System on its interstate operations, nor did it find that the proposed revised rates would be just and reasonable (J.A. 2–6). It simply announced that the Bell System proposed to file the revised tariffs.

On December 24, 1964, petitioner, the Public Utilities Commission of the State of California, requested rehearing of the Commission's "action" in the Public Notice (J.A. 7–13). It alleged that the Commission had violated its duty under Sections 205(a) and 409 of the Communications Act, 47 U.S.C. 205(a) and 409, by taking "action which will result in a change in charges; classifications, regulations or practices without a full opportunity for affected ratepayers to be heard * * *" (J.A. 9–10). The petitioner did not claim that the proposed tariffs were unreasonable or request the Commission to stay or suspend them.

By Memorandum Opinion and Order released February 12, 1965 (J.A. 14–21), the Commission dismissed the petition for rehearing on the ground that it had not made any binding determination or taken any action with legal significance, since (J.A. 19):

> "The Public Notice issued on November 25, 1964 did not and could not bind anyone to any action, nor was it a ruling on the proposed tariff filing."

The Commission stated that the petitioner could request a formal hearing at any time by filing a com-

plaint alleging that the proposed rates were unreasonable, and noted that the petition for rehearing did not contain any information or other basis for holding that the new tariff schedules were unreasonable (J.A. 21).

Petitioner did not file a complaint with the Commission challenging the legality of the new tariff. Instead it petitioned the court below for review of the Commission's Order denying rehearing, contending that the Public Notice was "agency action" within the meaning of Section 2(g) of the Administrative Procedure Act, 5 U.S.C. 1001(g), and, specifically, was rule-making by "approval or prescription for the future" of interstate telephone rates. It argued that the Commission had violated Sections 4, 7 and 8 of the Administrative Procedure Act, 5 U.S.C. 1003, 1006, 1007, which provide for notice and an opportunity to be heard in agency proceedings where rule-making is involved, as well as Sections 204 and 205 of the Communications Act, 47 U.S.C. 204, 205, authorizing the Commission to prescribe rates after a full hearing.

The court below ruled that the proposed new rates were carrier-made, not Commission prescribed, and that the Administrative Procedure Act's rule-making requirements applied only to agency-made rates (Pet. App. 3–8). For the same reasons, it held (Pet. App. 8–9) that Sections 204 and 205 of the Communications Act were not applicable because the Commission had not purported to prescribe what rates were to be charged. The court also held (Pet. App. 9–12) that petitioner could not properly claim an abuse of discretion amounting to a denial of due process since it

had failed to attack the reasonableness of the proposed rates, a course specifically left open to petitioner in the Commission's Memorandum Opinion and Order denying the request for rehearing.

On October 27, 1965, the Commission issued a Memorandum Opinion and Order, instituting a comprehensive formal investigation into the lawfulness of Bell's charges for interstate and foreign communications service. *In re American Telephone and Telegraph Company,* F.C.C. Dkt. No. 16258, 2 F.C.C. (2d) 871. The order directed a hearing, and granted leave to intervene to various interested parties, including "any state regulatory body." On December 23, 1965, the Commission denied Bell's petition to set aside its order of investigation and announced the procedures to be followed in the investigation. 2 F.C.C. (2d) 142, 173. We are informed that petitioner has intervened in this proceeding and that formal hearings into Bell's rates and charges began on June 7, 1966.

ARGUMENT

From a practical standpoint, the Commission's order of October 27, 1965, instituting a formal investigation into the Bell System's rates and charges, provides all the relief which petitioner sought in its request to the Commission for rehearing. It had asked that without suspending or staying the rate reductions filed as a result of the Commission's meetings with Bell representatives, the Commission should treat them as the occasion for an investigatory hearing, in which petitioner could participate, into A.T. and T.'s interstate rate base, revenues and expenses, and rate

of return; into the separation of intrastate from interstate operations; and into the relationship between state and interstate rates (J.A. 11–12). The Commission's order of October 27, 1965, as implemented (2 FCC (2d) 142), provided for this, and in addition, authorizes an investigation into matters not raised in the application for rehearing but presented in the petition for certiorari (Pet. pp. 19–23)[2]—the relationship between the Bell System and the Western Electric Company.

Moreover, the court below was correct in holding that the $100,000,000 reduction in interstate tolls following the Bell System's meetings with the Commission, were not agency-prescribed rates subject to the rule-making and hearing requirements of the Admin-

[2] The Commission's investigation will be conducted in two steps. Phase 1 will consider the total revenue requirements of the Bell System's interstate and foreign communication services, and the rate-making principles and classifications which should control the contribution which each of the System's principal rate classifications should make to the revenue requirements. In connection with this, the Commission will consider whether the System's charges are unreasonable, whether they improperly prefer or discriminate against any class of user or any locality, whether the Commission should prescribe charges and, if so, what they should be. An interim decision will be entered on this phase. In Phase 2, the Commission will examine all other matters relating to a just and reasonable level of earnings for major classes of interstate operations. This will include investigation of "separation" between state and interstate plant and equipment costs; the System's practice of incorporating various costs into the rate base; and the reasonableness of the prices and profits of the Western Electric Company on the sale of equipment, supplies and services to the System and its affiliates. *In re American Telegraph and Telephone Co.*, 2 F.C.C. (2d) 142.

istrative Procedure Act, 5 U.S.C. 1003, 1006, 1007. The Federal Communications Commission Act contemplates that communications carriers will file rate schedules on their own initiative without awaiting approval of new or revised rates by the Commission. 47 U.S.C. 203. If questions are presented as to the lawfulness of such rates, either upon complaint of interested parties such as petitioner, or upon the Commission's own motion, the agency may hold a hearing with respect to a carrier's rates (47 U.S.C. 204), and upon appropriate findings, prescribe lawful rates. 47 U.S.C. 205. This method of rate regulation was established under the Interstate Commerce Act (*Arizona Grocery Co.* v. *Atchison T. & S.F. Railway Co.*, 284 U.S. 370, 383–386, 390) from which the pertinent common carrier provisions of the Communications Act were taken, S. Rep. No. 781, 73d Cong., 2d Sess., pp. 3–4; H. Rep. No. 1850, 73d Cong., 2d Sess., pp. 5–6.

A rate becomes Commission-made, *i.e.*, approved or prescribed by the agency within the meaning of Section 2(c) of the Administrative Procedure Act, only when the Commission by order adopts the rate as its own and makes it binding upon the carrier. Such government-prescribed rates preclude rate payers from seeking damages in subsequent proceedings. *Arizona Grocery Co.* v. *Atchison T. & S.F. Railway Co., supra.*[3] But where the agency does not intend to prescribe a binding rate, there is no "approval or * * * prescrip-

[3] The phrase "approval or prescription" in Section 2(c) of the Administrative Procedure Act was taken from the *Arizona Grocery* case, see S. Rep. No. 752, 79th Cong., 1st Sess., p. 39.

tion," even if the agency goes so far as to find that "proposed schedules are shown to be just and reasonable and are not shown to be otherwise unlawful," *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, 682, 686–687, or to authorize the filing of supplements to tariffs embodying its own plan of "carefully selected, moderate" increases. *Algoma Coal & Coke Co.* v. *United States,* 11 F. Supp. 487 (E.D. Va.). See, also, *Birmingham Slag Co.* v. *United States,* 11 F. Supp. 486 (N.D .Ala.); *Koppers Co,* v. *United States,* 132 F. Supp. 159 (W.D. Pa.).

Thus, the Commission's Public Notice of November 25, 1964, announcing that the Bell System would file new tariffs reducing its rates, was not "agency action" within the meaning of Section 2(g) of the Administrative Procedure Act. It did not legally bind the carrier to file the tariffs proposed or preclude it from filing new or revised tariffs on its own motion, or place upon any tariffs the stamp of official approval which would preclude rate payers from seeking reparations in a subsequent proceeding. On the contrary, in denying petitioner's application for rehearing, the Commission expressly held that the tariffs remain open to challenge on the ground of unreasonableness (J.A. 19–21). Petitioner has not questioned the rates on this ground.[4]

[4] The court below found it unnecessary to pass upon the legality of the Commission's "continuing surveillance" of communication carriers—the process of informal meetings in which interstate rates are discussed. This practice, which has been in use since the Commission's earliest days, is well known to Con-

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
HOWARD E. SHAPIRO,
JOHN T. MARSHALL,
Attorneys.

HENRY GELLER,
General Counsel,
JOHN H. CONLIN,
Associate General Counsel,
ROBERT HADL,
Counsel, Federal Communications Commission.

JULY 1966.

---

gress. See, *e.g.*, F.C.C. Annual Report for 1937, p. 91; F.C.C. Annual Report for 1940, p. 30. Several Congressional hearings have taken up the subject of rate reductions flowing from informal discussions. Antitrust Problems of the Space Satellite Communications System: Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary Pursuant to S. Res. 258, 87th Cong., 2d Sess., pp. 282–283, 292–293, 698–757 (1962); Communications Satellite Legislation: Hearings Before the Senate Committee on Commerce on S. 2814, 87th Cong., 2d Sess., pp. 79–96 (1962); Progress Report of the Federal Communications Commission: Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, 88th Cong., 1st Sess. (1963). The Commission believes the procedure a lawful one in appropriate circumstances. The United States has had no occasion to take a position on this issue and we are satisfied that the question need not be reached on this record.

U.S. GOVERNMENT PRINTING OFFICE: 1966